JUN 23 1949
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 139

MARIO MERCADO E HIJOS,
Petitioner,

vs.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

BENJAMIN ORTIZ,
PEDRO M. PORRATA,
CHARLES CUPRILL,
Counsel for Petitioner.

INDEX

	Page
Petition	1
Basis of This Court's Jurisdiction	1
Statement of Matter Involved	1
Questions Presented	5
Reasons for Granting the Writ	7
Prayer	8

Brief:

Point One—The trial court found on the hearing on remand that "the defendant company when it sold molasses during the base period from April 10 to May 10, 1942, did not take into consideration the quantities sold in fixing the price. The defendant's company did not grant rebates or quantity discounts. Defendant's maximum price, under the Maximum Price Regulation, was, therefore, 17 cents. The Circuit accepted this view (see opinion). This being the case, it is now definitely established, that the sale of the molasses on March 3, 1944 was done in good faith, pursuant to a regulation of the Office of Price Administration, and therefore, the United States District Court for the District of Puerto Rico, lacks jurisdiction or power to hold defendant liable for damages or penalties under section 205 (d) of the Emergency Price Control Act, 50 USCA 405, and notwithstanding the subsequent amendments 32 and 45 to the R.M.P.R., under which regulation the defendant entered into the agreement to sell and deliver | 9 |
Preliminary Statement of Facts	10
Argument	12
I. It is our contention that the finding of the District Court as to compliance by defendant with the R.M.P.R. and its adjudication of penalties for violation of the sub-	

Page

sequent amendments to said R.M.P.R. raises before this Court now the paramount and fundamental legal question as to whether, under section 205 (d) of the Emergency Price Control Act, the imposition of damages and penalties against defendant is authorized by the statute 12

II. An analysis of the R.M.P.R., as it provided at the time of the contract (March 3, 1944) and the effect of the two subsequent amendments (of May 9, 1944 and August 2, 1944) upon the original regulation, will help to bring into the limelight the force of defendant's contentions in this case 14

III. Delivery at 17 cents became illegal only if any weight is given in this case to the subsequent amendments by the OPA of the regulations under which defendant acted 14

IV. Distinction between an agreement under a regulation and one entered before no regulation exists. 15

V. This point relating to the lack of power to impose damages or penalties affects the first and second judgments 17

VI. The grounds are now clear for a decision upon the applicability of section 205 (d) to both, the first and the second judgment, as anything said in the first appeal was lacking in the fundamentals necessary for a complete and final determination 18

Page

VII. The situation under the 1946 amendment tends to give color to point raised herein 19

Point Two—Defendant also contends that the court below committed error in not deciding that appellant had established the Chandler defense in this case and in not exercising its discretion in favor of appellant 22

Prayer 22

TABLE OF CASES

Crary v. *Porter*, 157 Fed. 2d 410 15

Porter v. *Bledsoe*, 159 Fed. 2d 495 16

Foster & Co. v. *Bowles*, Em. App. 1944, 144 Fed. 2d 870 17

Seagraves v. *Wallace*, 69 F. 2d 163 18

Scheffler v. *Bowles*, 153 F. 2d 4 20

FEDERAL AND LOCAL STATUTES

Sec. 205 (d) Emergency Price Control Act, 50 USCA 405 ..... 5, 6, 7, 12, 13

Section 205 (e) Emergency Price Control Act 5

UNITED STATES SUPREME COURT

OCTOBER TERM, 1949

No. 139

MARIO MERCADO E HIJOS,
Defendant-Petitioner,

vs.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE,
Plaintiff-Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the United States:

Jurisdiction

The jurisdiction of this Court is invoked pursuant to Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. 347 (a). Judgment entered by the Circuit Court on March 25, 1949.

Statement of Matter Involved

The action originating this petition was filed on Dec. 20, 1944 by the Price Administrator, under Section 205 (e)

of the Emergency Price Control Act of 1942. (50 U. S. C. A. App. 925 (e).)

On March 3, 1944, the defendant entered into a contract with Destilería Serrallés, Inc. to sell 1,250,000 gallons of cane blackstrap molasses at a price of 17 cents per gallon. (Plaintiff Exhibit A, OR. R. 103, 13).

The sale was made in compliance with the General Maximum Price Regulation 183, *prevailing at the time of the sale.* (R. 76, and Circuit Court Op. 4-5).

On the first trial before the U. S. District Court for Puerto Rico, Judge Cooper accepted defendant's view that delivery of the molasses was to take place upon the deposit of said molasses in a tank at a distance of 2 miles from defendant's place of business and awarded damages for 12,309.86 in regard to all molasses delivered after May 9, 1944. The District Court also held at that time that defendant had only one kind of purchaser. (OR. R. 134-143).

The judgment of the District Court was reversed by the Circuit, which, among other things, expresses itself as follows:

> *"Moreover, the court in our view misinterpreted the term "purchaser of the same class" appearing in the General Maximum Price Regulation.* This was important since, *when the contract was executed, that regulation was in effect,* and defendant's pricing in the contract, as measured against it, would be an important factor to be considered in exercising judicial discretion. There was uncontradicted evidence that Mr. Mandry, defendant's acting manager, who signed the contract on its behalf, knew that the General Maximum Price Regulation set the maximum price as that charged during the base period to each class of purchasers. During the base period defendant had made deliveries under a contract for the sale of 1,800,000 gallons of molasses at 13 cents per gallon. Dur-

ing that period defendant also sold and delivered 7 lots of molasses ranging from 50 to 7,300 gallons of molasses to 7 individual purchasers at 17 cents per gallon. The court found that the quantity purchaser bought for resale, the others for their own consumption. *On the findings the court determined that the class of the purchaser should be decided by "the use of the commodity".* This classification placed Serrallés, who bought the molasses for use in its distillery, in the same class as the small purchasers in the base period. *Sec. 1499.20 (k), 7 F. R. 3156, of the General Maximum Price Regulations defines the words "purchaser of the same class" as referring to "the practice adopted by the seller in setting different prices for commodities or services for sales to different purchasers or kinds of purchasers". The criterion is therefore defendant's business practice.* As to this the purchaser's use can conceivably be an evidential, but not an ultimate, factor. The evidence here introduced would suggest that defendant did allow quantity discounts; but we do not decide that point, since evaluation of the evidence is for the district court. *"We think therefore that the case should also be remanded to allow the district court to reconsider its award of damages in accordance with the view here expressed."* (Italics ours.)

On the second hearing before the District Court, the said court reiterated its finding that defendant did not take into consideration the quantities sold in fixing the price and did not grant rebates or quantity discounts (R. 76), but Judge Chaves, then presiding, imposed penalties, against defendant in addition to the overcharge, in the sum of 21,250.68 "for having willfully violated *amendments No. 32 and 45 to the Revised Maximum Price Regulation No. 183",* but ignored the fact that defendant complied with the regulation as it existed at the time of the sale.

On the second appeal, and in regard to the compliance with the then existing regulation, the Circuit Court concluded as follows:

> True, we did suggest, 163 F. 2d 303, 309, *that the original contract may itself have been illegal, as in excess of charges made by defendant during the base period;* and this point has now been removed from the case by the finding of the district court *that defendant "did not grant rebates or quantity discounts" during the base period.* The effect of this finding *is to establish the legality of the contract when originally made,* since it means that the contract price of 17 cents a gallon *was then the correct one for purchasers for consumption, even though they purchased in such large amounts as were here involved.* But this does not reach our conclusion that a delivery illegal under the regulations in force at the time it is made is not thereby validated under 205 (d) *merely by reason of the fact that it is in fulfillment of a contract of sale valid when made* (Italics ours).

(We might suggest right here in a parenthesis that what defendant violated according to Judge Chaves was Amendments 32 and 45 to the regulations under which defendant had already made a valid sale.)

Also appears from the record that prior to the execution of the contract, defendant, through both its attorney and acting manager, made oral and written inquiry at the Office of the Regional Administration of the Office of Price Administration in San Juan concerning the ceiling price applicable to the sale (First R. 98-9, 73-4, Pltf. Ex. 4-A, B-24-5) and under date February 29, 1944, was advised in writing that *"the present ceiling price of molasses is the highest price charged during the base period, April 10-May, 1942, to each class of purchaser"* (Pltf. Ex. 4-B, R. 26.)

The facts of this case, we submit, require the issuance of a writ of certiorari under Rule 38, paragraph 3 to review the application given by the Circuit Court to the facts of this case, of Section 205 (d) of the Emergency Price Control Act, which section reads as follows:

> "No person shall be *held liable for damages or penalties in any Federal, State or Territorial Court* on any ground for or in respect of anything done in good faith pursuant to any provision of this Act or *any regulation, order, price schedule, requirement or agreement thereunder,* or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Price Administration and Civilian Supply, *notwithstanding that subsequently such provision, regulation, order, price schedule, requirement are determined to be invalid*". (Italics ours.)

Also section 205 (e) of the Act as amended, effective July 25, 1946, 60 Stat. 676, 677, which reads as follows:

> "The Administrator may not institute any action under this subsection on behalf of the United States, or, if such action has been instituted, the Administrator shall withdraw the same.
>
> (1) if the violation arose because the person selling the commodity acted upon and in accordance with the written advice and instructions of the Administrator or any regional administrator or district director of the Office of Price Administration.

Questions Presented

1. Under Section 205 (d) a subsequent amendment to a regulation pursuant to which a seller makes a contract, can be of no avail to the government in any court of the United States in a suit for damages or penalties against such seller, who incurred in liabilities and acquires

rights in good faith pursuant to and in compliance with the regulation as then prevailing.

2. There is an obvious distinction between a contract or agreement under a regulation or price schedule, etc. and a contract or agreement entered into in anticipation of regulation. Section 205 (d) does not protect a contract in anticipation of regulation. It protects only agreements, made or entered in compliance or pursuant to an already existing regulation; undoubtedly under the theory that a regulation is an equivalent to an order or authorization from the government given to all sellers, while contracts entered in anticipation of regulation do not enjoy the sanction or guarantee of such government order.

3. An OPA regulation is an equivalent to a law: in Section 205 (d) Congress *protected the person acting according to law.* The Circuit Court, therefore, in not protecting defendant, disregarded an obvious command of Congress and committed error.

4. The term "agreement thereunder", used in Section 205 (d) qualifies, the term "any regulation", "order", "price schedule", or "requirement" *and means an agreement under a regulation as well as an agreement under an order or price schedule.* The Circuit Court, therefore, in limiting the meaning of "agreement thereunder" *to agreement under the terms of the Act, violated* the principle that where the law makes no distinction, the Court can not make any.

5. Section 205 (d) represents a specific exception to the general coverage of the statute, originating in the principle that no person should be penalized for acting according to law, and the Circuit Court committed error in not treating section 205 (d) as an exception.

6. It also must be plain that if the circuit is correct and section 205 (d) protects action under regulation, it must also

be understood as protecting a contract made in compliance thereto.

Reasons for Granting the Writ

Section 205 (d) has not been interpreted by this Court. As applied by the Circuit in this case, the Court denies to defendant the benefit of the specific exception established by the statute that "no person shall be held liable for damages or penalties in any Federal, State or Territorial Court, on any grounds . . . for . . . anything done or omitted to be done in good faith pursuant . . . to any regulation, order, etc. . . . *or agreement thereunder . . . notwithstanding that subsequently such provision, regulation, order, price schedule, requirement or agreement may be modified, rescinded or determined to be invalid.*"

The holding of the Circuit tends to ignore that what defendant is being held as violating, according to the findings of the District Court, was not a regulation but amendments Nos. 32 and 45 to the Maximum Price Regulation No. 183 (R. 78); that defendant did not act in anticipation of regulation *but according to the regulation prevailing at the time of the sale* and that it is to protect special cases like this that section 205 (d) was enacted.

The ignoring of section 205 (d) or the limitation imposed upon its meaning by the Court below, represents error from either one of three important points of view:

A. The point of view of an obvious misinterpretation of a Federal Statute not yet interpreted by this Court.

B. The point of view as to the power of any court of the United States to disregard the plain meaning of an act of Congress.

C. The point of view of penalizing a person for acting according to law and on the basis of subsequent amendments that the government, which in this case is the other

party, may promulgate; the government being the one to be benefited out of any violation that may be imputed and arising out of the natural confusion caused by amendments not altogether clear as shown by the fact that courts conflict about their meaning.

It is also believed that in the amendment of July 25, 1946, (ante, page 5), Congress manifested an intention to liberalize the Statute to take care of situations as the one presented by this case, and that the court in this case insists in applying the statute contrary to the wish of Congress, penalizing the seller for action taken in compliance with regulation and instructions from OPA.

Prayer

For the foregoing reasons, your petitioner prays that a writ of certiorari issue out of this court to the United States Circuit Court of Appeals for the First Circuit and that the duly certified copy of the transcript of proceedings below which accompanies the petition herein shall be treated as though filed in response to the aforesaid writ, to the end that this cause may be reviewed and determined by this Court; that the judgment and decision of the Circuit Court of Appeals may be reversed; and that your petitioner may be granted such other and further relief as may be proper.

Ponce, Puerto Rico, this 21st day of June, 1949.

Respectfully submitted,

BENJAMIN ORTIZ,
PEDRO M. PORRATA,
CHARLES CUPRILL,
Attorneys for Defendant-Petitioner,
Mario Mercado e Hijos,
Box 1224-Ponce, Puerto Rico,
Concordia esq, Luna, Ponce, P.R.
By PEDRO M. PORRATA.

SUPREME COURT OF THE UNITED STATES

MARIO MERCADO E HIJOS,
Defendant-Petitioner,

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE,
Plaintiff-Respondent

BRIEF IN SUPPORT OF PETITION

POINT ONE:

The trial court found on the hearing on remand that "the defendant company when it sold molasses during the base period from April 10 to May 10, 1942, did not take into consideration the quantities sold in fixing the price. The defendant company did not grant rebates or quantity discounts." Defendant's maximum price, under the Maximum Price Regulation, was, therefore, 17 cents. The Circuit accepted this view (see opinion). This being the case, it is now definitely established, that the sale of the molasses on March 3, 1944 was done in good faith, pursuant to a regulation of the Office of Price Administration and, therefore, the United States District Court for the District of Puerto Rico, lacks jurisdiction or power to hold defendant liable for damages or penalties under section 205 (d) of the Emergency Price Control Act, 50 U. S. C. A. 405, and notwithstanding the subsequent amendments 32 and 45 to the R. M. P. R., under which regulation the defendant entered into the agreement to sell and deliver.

Preliminary Statement of Facts

Let us examine first the Opinion of the Circuit Court remanding this case after the first trial to the lower court.

I. In remanding this case to the District Court, the Circuit, after stating that the lower court misinterpreted the term "purchasers of the same class," appearing in the Maximum Price Regulation (prevailing at the time of the sale on March 3, 1944), classified as important the proper interpretation of that point in this case and proceeded to authorize or suggest the reception of evidence on the question of compliance by defendant with the said Maximum Price Regulation. The court expresses itself as shown in the Petition, ante pages 2-3.

II. In obedience to the mandate of the Circuit, the District Court proceeded to receive evidence on the question of compliance by defendant with the R. M. P. R. and concluded, as a matter of fact, that defendant company did not take into consideration the quantity sold in fixing the price for its molasses and that it did not grant rebates or quantity discounts. The conclusions of the District Court upon this question are embodied in findings XVII, XXI and XXIII, which read as follows:

> "XVII. That at the time that the contract was executed between defendant and Destileria Serralles on March 3, 1944, Mr. Felix Hilera, inquired of defendant as to his base period price and Mr. Mandry told Mr. Hilera *that he had verified with the Office of Price Administration that the OPA price was 17 cents per gallon.*" (Italics ours.)

> "XXI. That during the base period April 10 to May 10, 1942, defendant sold and delivered 7 lots of molasses to 7 individual purchasers at *17 cents per gallon.*" (Italics ours.)

"XXIII. That the defendant company when it sold molasses during the base period from April 10 to May 10, 1942 *did not take into consideration the quantities sold in fixing the price. The defendant company did not grant rebates or quantity discounts.*" (Record, p. 76.) (Italics ours.)

These findings were approved by the Circuit. (See quotation from Opinion, Petition ante, page 4).

After concluding as shown in the findings quoted ante, that defendant had made his contract in agreement and conformity with the price authorized by the R. M. P. R. then prevailing, the District Court, in its judgment, proceeded nevertheless to charge defendant with violation *of amendments 32 and 45 to the R. M. P. R.*, under which the contract was made; as follows:

"It is further ordered, adjudged and decreed, that pursuant to the Findings of Fact and Conclusions of Law filed herein, the defendant pay to the plaintiff an additional sum of $21,250.68 *for having willfully violated Amendments No. 32 and No. 45 to Revised Maximum Price Regulation No. 183,* and for having failed to take practicable precautions against the occurrence of said violations." (Italics ours.)

III. It is, therefore, definitely established in this case, that at the moment the contract of March 3, 1944 was made, defendant complied with the R. M. P. R. No. 183 as then prevailing, but that, in the conclusion of the District Court, *defendant violated amendments 32 and 45 of May 9, 1944 and August 2, 1944,* respectively, to the said R. M. P. R. Defendant, for the purpose of this point, complied with the regulations as it existed at the time of the contract, and according to the Court, *violated the subsequent amendments No. 32 and No. 45 to said R. M. P. R., pursuant to which, the agreement was entered into.* This alleged violation of the two subsequent amendments, 32 and 45 (not existing at the

time of the contract) to the R. M. P. R. under which the contract was entered into on March 3, 1944, while carrying out the terms of the legal agreement, is the reason why defendant is being penalized, first with the sum of $42,501.36, and, then with the additional sum of $21,250.68, imposed by the District Court on the second trial.

ARGUMENT

I. It is our contention that the finding of the District Court as to compliance by defendant with the R.M.P.R. and its adjudication of penalties for violation of the subsequent amendments to said R.M.P.R. raises before this Court now the paramount and fundamental legal question as to whether, under section 205 (d) of the Emergency Price Control Act, the imposition of damages and penalties against defendant is authorized by the statute.

Section 205 (d) provides that *no person shall be held liable for damages or penalties on any grounds for or in respect to anything done or omitted to be done in good faith pursuant to any provision of this Act, or any regulation, order, price schedule, requirement or agreement thereunder,* notwithstanding that subsequently such provision, regulation, order, price schedule, requirement or agreement, *may be rescinded, modified or determined to be invalid.*

The exact wording of Section 205 (d) is as follows:

> "No person shall be held liable for damages or penalties in any Federal, State or Territorial Court, on any grounds for *or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement or agreement thereunder,* or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Price Administration and Civilian Supply, *notwith-*

standing that subsequently such provision, regulation, order, price schedule, requirement or agreement may be modified, rescinded or determined to be invalid." (Italics ours.)

Section 205 (d), therefore, represents an order to the courts or a bar upon their jurisdiction, not to penalize a seller for anything done pursuant to an agreement in conformity with and under a regulation prevailing at the time of the sale. In other words: obligations incurred or rights acquired pursuant to or in accordance to a regulation, cannot be used by the government, or by the buyer, to file a suit for damages or penalties against the seller "*in any Federal, State or Territorial court*". An injunction may probably be filed, but not a suit for damages or penalties.

Can it possibly be said that the subsequent amendments 32 of May 9, 1944, and 45 of August 2, 1944 to the R. M. P. R., enacted, *the first one over two months and the second one about five months after the contract of sale was effective,* avail the government with a cause of action for damages or penalties against defendant? It clearly cannot, because section 205 (d) provides that "no person can be held liable for damages or penalties . . . in respect to anything done or omitted to be done under a regulation . . . or agreement thereunder," *notwithstanding that subsequently such regulation, provision or order, price schedule, requirement or agreement may be rescinded, modified or determined to be invalid.*" That is to say: for the purpose of a claim for damages or penalties in a Federal court under this Act, a subsequent amendment to a regulation under which an agreement was entered into cannot be used by the Government in any action for damages or penalties against the seller.

II. An analysis of the R.M.P.R., as it provided at the time of the contract (March 3, 1944) and the effect of the two subsequent amendments (of May 9, 1944 and August 2, 1944) upon the original regulation, will help to bring into the limelight the force of defendant's contentions in this case.

The R. M. P. R. provided that the seller's maximum price for any commodity "shall be, in those cases in which the seller dealt in the same commodity during the period from April 10, 1942 to May 10, 1942, the highest price charged by the seller during such period for the same commodity to a purchaser of the same class."

Amendment 32 to said R. M. P. R. provided that, on or after May 9, 1944, the maximum price for molasses shall be 13.6 cents per gallon delivered at the mill and amendment 45 to that same regulation provided that 13.6 cents per gallon was for molasses delivered at the mill or at the mill tank.

III. Delivery at 17 cents became illegal only if any weight is given in this case to the subsequent amendments by the OPA of the regulations under which defendant acted.

It is patent, therefore, that delivery under the contract of March 3, 1944 (original record, p. 103) at 17 cents was found illegal only because of the subsequent amendments 32 and 45 to the R. M. P. R.; amendments not existing at the time when the agreement was entered into. To hold that such subsequent amendments can be of any avail to the government in any court of the United States, in a suit for damages or penalties, runs counter and violently conflicts with the obvious purpose and implied equity of section 205 (d) of the Emergency Price Control Act, which does not allow the imposition of damages or penalties on the

basis of a subsequent amendment to a regulation *complied with by the seller at the time of the agreement.*

IV. Distinction between an agreement under a regulation and one entered before no regulation exists.

It will further help to understand defendant's contentions, the obvious distinction between a contract or agreement in anticipation of regulation and a contract or agreement under a regulation or price schedule, etc. . . . Section 205 (d) does not protect a contract entered into before regulation was established. *It protects only agreements made or entered into in compliance or pursuant to regulation. Crary* v. *Porter,* 157 Fed. 2d 410. This, undoubtedly, under the theory that a regulation is equivalent to an order or authorization from the government given to all sellers; while contracts in anticipation of regulation do not enjoy the sanction or guaranty of such order. Furthermore, regulation implies that the government already examined the pricing situation and considered agreeable to public interest the ceiling price accorded therein, while the price agreed to in a contract previous to regulation, answers only to the private interest and criteria of the contracting parties.

CRARY v. PORTER, 157 Fed. 2d 410, at p. 413.

"It is argued that section 205 (d) of the Act, 50 USCA, Appendix, 925 (d) exempts a seller from liability for violating a price regulation, if he has acted in good faith. Appellants have misread the language and purpose of this section of the statute. The section provides that "no person shall be held liable for damages or penalties . . . on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder . . . notwithstanding that subsequently such provision, regulation, order, price schedule, re-

quirement or agreement may be modified, rescinded or determined to be invalid. . . . Clearly, this provision has application only to things done pursuant to or in conformity with the Emergency Price Control Act and not to things done contrary to or in violation of it, whether in good faith or bad faith. As the report of the Senate Committee on Currency and Banking declared, Sen. Rep. 931, 77th Cong. 2d Sess., at the time the statute was enacted, "of course Section 205 (d) *does not confer any immunity upon any person who violates any such provision, regulation, order or requirement.*" See also Bowles *v.* Indianapolis Glove Co., 7 Cir. 150 F. 2d 597, 600; Bowles *v.* Franceschini, 1 Cir. 150 F. 2d 510, 512-514; Scheffler *v.* Bowles, 10 Cir. 153 F. 2d 1, 4. (Italics ours.)

PORTER v. BLEDSOE, 159 F. 2d 495, at 498.

"(4) Nor may defendants find refuge in Section 205(d) of the Act, 50 USCA, Appendix 925 (d) for clearly the reference in good faith therein *has application only to acts done pursuant to or in conformity with some provision of the Emergency Price Control Act which may have been modified, rescinded or held to be invalid.* The provision does not relate to acts in derogation of the statute. See report of the Senate Committee on Currency and Banking, Sen. Rep. No. 931, 77th Cong. 2d Sess. (1942) stating at the time the statute was enacted: . . ."of course Section 205 (d) *does not confer any immunity upon any person who violates any such provision, regulation, order or requirement.*" See also Crary *v.* Porter, 8 Cir., 157 Fed. 2d 410, Scheffler *v.* Bowles, 10 Cir., 153 Fed. 2d 1. (Italics ours.)

Applying this principle to the agreement of sale in this case, the price charged by defendant as found by the lower court, was the price authorized by regulation. It derived, therefore, from the ideas and thinking of the government embodied in the regulation. Congress in Section 205(d)

protected the carrying out of the contractual agreement under the powerful principle that the contract price, being authorized by law, the government is not entitled to avail itself of a subsequent amendment in a suit for damages or penalties.

Ours is not a case as to whether the Administrator has power to change a regulation. The Administrator obviously has power to do so. *Foster & Co.* v. *Bowles,* Em. App. 1944, 144 Fed. 2d 870. It is a case as to whether the government can sue *a person who entered into an agreement under a regulation for carrying out the obligations or exercising the rights acquired under it.* The words "or agreement thereunder" are crucial under the statute. It is not less crucial and illuminating that the statute specifically provides that no subsequent modification of a regulation can be used by the government or by the buyer to sue the seller for damages or penalties in any court of the United States.

V. This point relating to the lack of power to impose damages or penalties affects the first and second judgments.

The point presented and discussed hereinbefore, is material, both, in regard to the imposition of the $21,250.68 penalty, as well as in regard to the $42,501.36, involved in the previous appeal, and, with due respect to contrary opinion, the finding made by the District Court of compliance with the R.M.P.R. requires a reversal of both judgments.

When this case was before the Circuit on the first appeal, the court decided to order a reinvestigation as to whether defendant, when entering into the contract of March 3, 1944, violated the R.M.P.R. It ruled that the lower court had misinterpreted the term "purchaser of the same class" used in the R.M.P.R. (See Petition ante, p. 2). The District Court reinvestigated this question on remand and

reached the conclusion that during the base period defendant made no distinction as to classes of purchasers: (ante p. 10); which means that defendant complied with the R.M.P.R. at the time of entering into the agreement to sell and deliver on March 3, 1944, and what defendant violated, according to the District Court and as shown heretofore, were admendments 32 and 45 by exercising the right to deliver at 17 cents acquired in the perfectly valid contract of March 3, 1944.

VI The grounds are now clear for a decision upon the applicability of section 205 (d) to both, the first and the second judgment, as anything said in the first appeal was lacking in the fundamentals necessary for a complete and final determination.

We now know that the contract was made in good faith under and pursuant to the R.M.P.R.; we now know that the R.M.P.R. was subsequently amended by amendments 32 and 45; that the delivery made at the agreed price did not violate the regulation under which the agreement was entered into, and that liability can only be predicated for the alleged violation of subsequent modifications of the regulation under which the agreement was made (Findings XVII, XXI and XXIII quoted ante, and also judgment of court below, quoted at page 11 of this brief).

With the facts that the District Court found, which were not before the Circuit in the previous appeal or before this Court in the previous petition, this Court is now in a position to apply the principle of *Seagraves* v. *Wallace*, 69 F. 2d 163, Cert. and Rehearing Denied, 293 U. S. 569, and 293 U. S. 630, to the effect of reversing both judgments. In the *Seagraves* case, the Court expresses itself thus:

> "An appellate court, so long as it has jurisdiction over the controversy, ought to have power to do justice according to law, and should be more ready to cor-

rect its own previous error, if such clearly appears, than to correct the errors of the District Court. Justice is better than consistency. The court is not bound at the will of litigants to revise its previous holdings, *but when itself convinced that it should, it can.* It may be said not stare decisis but fiat justitia, ruat coelum. *Johnson* v. *Cadillac Motor Co.* (C.C.A.) 261 F. 878, 879; 8 A.L.R. 1023; Higgins *v.* California Prune & Apricot Grower (C.C.A.) 3 F (2d) 896; Luminous Unit Co. *v.* Freeman Sweet Co. (C.C.A.) 3 F. (2d) 577 (Italics ours).

VII. The situation under the 1946 amendment tends to give color to point raised herein.

In passing upon the question raised by us as to the baring of this suit by the 1946 amendment to section 205 (e), the Circuit Court stated:

> "Nor does the 1946 amendment to section 205 (e) bar the suit, because Besosa, on whose information defendant claimed reliance, was not one of the officials specified in that amendment as having power to prejudice the Administrator's right of suit."

Section 205 (e) as amended provides that if the Administrator has instituted action in those cases in which the violation arose because the person selling the commodity acted upon and in accordance with the written advice and instructions of the Administrator or any Regional Administrator or District Director of the Office of Price Administration, the action shall be withdrawn (50 USCA App. Sec. 925 (e) p. 253).

Section 205 (e) as amended reads as follows:

> "The Administrator may not institute any action under this subsection on behalf of the United States, or, if such action has been instituted, the Administrator shall withdraw the same.
>
> (1) If the violation arose because the person selling the commodity acted upon and in accordance with the

written advice and instructions of the Administrator or any regional administrator or district director of the Office of Price Administration; . . .

Scheffler v. *Bowles,* 153 F. 2d p. 4.

In that case, the court at page 4 stated:

"Actions taken in reliance upon and in conformity with an official interpretation and prior to any revocation or modification thereof or to any superseding thereof by regulation, order or amendment, shall constitute action in good faith pursuant to the provision of the Act or of the regulation. "Appellants therefore could urge good faith as a defense only if they followed the law in obtaining the advice upon which they relied".

As the record shows, defendant, not only acted upon the written advice of Mr. Besosa, Price Manager of the Office of Price Administration, but while acting according to advice, also acted in accordance and conformity with the Maximum Price Regulation, *prevailing at the time of entering into the contract.*

And as shown by the wording quoted ante from the Opinion of the Circuit on the first appeal, the only reason given for the non-compliance of the 1946 amendment, was that Besosa was not one of the officials specified in the amendment as having power to prejudice the Administrator's right of suit. However, we must again invite the attention of this court, to the principle behind the said 1946 amendment, as the Government has not yet denied the power of Besosa to write in the name of the OPA and it seems to us inequitable that the government be allowed to permit a person to write in its name and then denied responsibility.

On the hearing on remand, attorney Porrata put a question to the learned counsel for the government as to whether the government would deny that Besosa had the right to write for the OPA. The government's counsel answer

to the question was substantially, that that issue had already been determined by the Appellate Court. Let us quote from the record:

Record, p. 24:

> Mr. Porrata: May I ask a question, Mr. Fike? Do you deny that Mr. Besosa had the right, for the OPA to write us what was the ceiling price of molasses on February 25, 1944? May I tell you that he was in charge of the Price Panel of Puerto Rico? And do you deny that he was empowered to write us giving us that information? May I call attention to the fact that at the time that question was raised here the Government did not deny that Mr. Besosa was entitled to write us that letter that appears on page 25, and 26 of the record, and the letter answering our letter in regard to maximum price here in Puerto Rico at that time?
>
> Mr. Fike: I don't think that I have to deny it. I think that counsel is confusing two issues. That issue has already been determined by the Appellate Court. It says so there in the opinion (R. 24).

It is true that the 1946 amendment requires that the advice and instructions be given by the Administrator or any Regional Administrator or District Director of the Office of Price Administration, but it cannot be denied that in practice the Administrator acts through different heads of the Department into which each Regional Office is divided, and in Puerto Rico, if Besosa was writing as to prices, and he was doing it without authority from the Administrator, when Besosa's letter was introduced by defendant in evidence showing instructions given by Besosa, using paper of the Office of Price Administration and signing himself as Food and Beverages Section, (Original Record, 25-26), the government should be considered at least as morally bound to explain the situation and show that it was not committing inequity.

In any way, this case as seen from the standpoint of the idea of Congress embodied in the 1946 amendment and in view of the findings of the court below, may properly be considered as one deserving a reversal of the present judgment of $21,250.68 and the vacating of the first one of $42,501.36 as dictated in violation of Section 206 (d) and (e) 50 USCA Sec. 925 (d) and (e).

POINT TWO

Defendant also contends that the court below committed error in not deciding that appellant had established the Chandler Defense in this case and in not exercising its discretion in favor of appellant but will not enlarge on this point preferring to rely, for the time being, on the point relating to the interpretation of Sections 205 (d) and 205 (e) as amended.

Prayer

Defendant prays that the Writ be issued and the case be reviewed by this Court.

Respectfully submitted,

BENJAMIN ORTIZ,
PEDRO M. PORRATA and
CHARLES CUPRILL,
Attorneys for Petitioner,
Box 1224—Ponce, P. R.,
Concordia esq. Luna-Ponce, P. R.

INDEX

Subject Matter Index

	Page
Introduction	1
Uncontradicted facts of this case	1
Respondent's contentions only show that this writ should be issued	4
Section 205(d) provides an exception for cases as ours	5
Conclusion	8
Pray	8

Cases Cited

Andreas v. *Clark* (1934), 71 F. 2d 908, cert. denied, 55 S. Ct. 111, 293 U. S. 555, 79 L. Ed. 657	6
Foster & Co. v. *Bowles,* 144 F. 2d 870	7
McClusky v. *Cromwell,* 11 N. Y. 593, 601	4
Rutgers, Chapter of Delta Upsilon Fraternity v. *City of Brunswick,* 32 A. 2d 364	7
U. S. v. *Mullendore,* 35 F. 2d 78	7

Regulations

Section 205 (d) Emergency Price Control Act	4
Amendments 32 and 45 to the RMPR	

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 139

MARIO MERCADO E HIJOS,

Petitioner,

vs.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONER

The jurisdiction of this Court to review the decision of the Circuit Court of Appeals is established by Section 237 of the Judicial Code, paragraph (b), 28 U. S. C. A. 344. Also rule 38, paragraph (5) of the Rules of this Court.

Uncontradicted Facts of This Case

According to the requirements of Rule 38, paragraph (5), a question of federal law which has not been, but should be settled by this Supreme Court, should be successfully presented by Petitioner in its Petition and Brief. In our

view, Petitioner has achieved that aim. The language of section 205(d) of the Emergency Price Control Act (50 USCA App. 925 (d)), that of section 205(e) (50 USCA App. 925(e)) and that of section 4(a) (50 USCA App. 904(a)), read on the light of the admitted facts of this case, plainly warrant the issuance of the writ. The admitted facts are as follows:

1. The contract price, at which defendant agreed to sell and deliver its molasses, was the ceiling price for this commodity established by the OPA regulation prevailing at the time of the agreement. (Resp. Br. p. 2).

2. It was not the regulation existing or prevailing at the time of the contract what defendant is being charged with violating, but two subsequent amendments enacted, one May 9, 1944 (No. 32) providing for 13.6 per gallon *delivered at the mill;* another of August 2, 1944 (No. 45), *adding to the language of the first amendment, the phrase "or at the mill tank."* (Resp. Br. p. 5).

The first amendment (No. 32), fixing a dollar and cents price for molasses *delivered at the mill,* came to defendant's knowledge through the newspapers. The second amendment (No. 45) adding the phrase "or at the mill tank," *instead of merely at the mill,* was never notified in any way to the public, except by the fact that it was published in the Federal Register in Washington.

3. The OPA which followed the practice of giving advice through Besosa, Head of the Price Panel, now attaches no meaning or significance to the advice given in the name of the OPA by said official. (Resp. Br. 4, 6).

The Circuit Court of Appeals in its opinion impliedly labors under the idea that it was an easy matter for defendant who (1) before making the sale agreement consulted and obtained advice from the OPA as to the ceiling price

then prevailing; (2) acted according to the advice and complied with the Regulation (RMPR) prevailing at the time of the sale, to keep up with the government here in Washington in regard to the possible meaning and effect upon the contract of subsequent amendments to the regulation under which defendant acted. In regard to these subsequent amendments, it may be of some use to notice:

1. Amendment 32 of May 9, 1944 established the price for molasses *delivered at the mill;* amendment 45 of August 2, 1944, added the phrase *"or at the mill tank."*

2. By the time amendment 45 was enacted, *all molasses had been paid for and were already deposited at the buyer's risk in a tank belonging to petitioner two miles away from the mill.* (Resp. Br. p. 5. Also Original Record, pgs. 12-13).

3. The molasses were withdrawn by the buyer by December 7, 1944, and, by December 20, 1944, *without giving any opportunity to the seller,* the OPA filed suit.

4. The difference between the contract price and the price reduced by the subsequent amendments, was $42,501.36. The OPA, it seems to us, acted under the presumption that a seller who meets amending regulations as those of this case, can humanly be required to return the $42,501.36 already collected on mere suspicion that the subsequent amendments affected the contract already consumated under the ordinary rules of sale. But this, in our judgment, is oppressive and ignores elementary human considerations, which should never be ignored in the sound application of laws.

Respondent's Contentions Only Show That This Writ Should Be Issued

Let us examine more fully, respondent's contentions. Respondent contends in its brief that the deliveries were not deliveries pursuant to an agreement made under the terms of the Emergency Price Control Act. Section 205(d)—in respondent's theory—bars the imposition of a penalty for action taken pursuant to any provision of the Emergency Price Control Act or any regulation, order, price schedule "or agreement thereunder." The phrase "agreement thereunder"—respondent continues saying—means an agreement under the terms of the Act, etc.

But the respondent's contentions offer serious doubt. It is the language of the statute what firstly controls a court in determining its meaning. By placing in the statute the term "or agreement thereunder" after the terms *regulation, order, price schedule* and *requirement,* Congress meant, in our judgment, "or agreement thereunder" *to refer to an agreement under a regulation, order, price schedule, requirement, as well as to an agreement under the terms of the Act.* That in Section 5 the Act refers to "pricing agreements," is nothing but mere coincidence and cannot be used as meaning that whenever the word agreement is used it means a "pricing agreement" and not an agreement under a regulation, *as the one fairly and honestly entered by defendant with the buyer after consulting the OPA officials, showing thereby the unquestionable good faith of the transaction.*

To limit the phrase "or agreement thereunder" only to "pricing agreements" under section 5 of the Statute as the Government pretends, is a subtle and forced construction for the purpose of limiting the operation of section 205(d). Courts cannot by construction vary the terms of a statute. *McClusky* v. *Cromwell,* 11 N. Y. 593, 601. (Black Interpretation of Laws, pages 45, 56.)

Section 205(d) Provides an Exception for Cases as Ours

Respondent also claims that, if appellant's interpretation is correct, it would amount to a complete nullity of the provisions of Section 4(a) of the Act (50 USCA 904(a)), which make it unlawful to sell or deliver any commodity in violation of a price regulation, "regardless of any contract or 'agreement' heretofore or hereafter" made.

However, "heretofore and hereafter," refers to the date of the Act. It does not refer to the date of any regulation which might come afterwards. And furthermore, section 205 (d) protects obviously an act which technically might be regarded as illegal under Section 4(a), but which Section 205(d) exempts from damages or penalties *because the illegality occurs on account of a subsequent amendment to the regulation under which the defendant made the contract and under circumstances making it unjust to penalize a seller.*

In other words: Section 205 (d) excepts from the operation of the Price Control Act, *insofar as any court may impose damages or penalties under it,* acts done or omitted to be done *pursuant to any regulation "or agreement thereunder."*

> Sec. 205(d). No person shall be held liable for damages or penalties in any . . . Territorial court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act *or any regulation, order, price schedule, requirement or agreement thereunder . . . notwithstanding that subsequently such provision, regulation, order, price schedule, requirement or agreement may be modified, rescinded, or determined to be invalid.* (Italics ours.)

By enacting section 205(d) Congress meant, either that the thing excepted might be within the general purview

of Section 4(a), or else, Congress wanted to make it clear that a person contracting pursuant to an existing regulation should not be subjected to damages or penalties because of a subsequent amendment to the regulation under which he acted; the application of which subsequent amendment being not easy to determine at first hand as shown by the conflict of opinions of the courts passing upon the merits of this case.

It is plain that the withdrawal of the molasses by the buyer from September 12, to December 7, 1944, became illegal only because of the subsequent amendment to the RMPR, under which, the sale agreement was made. And it should be noticed, as a very important fact, that by June 24, 1944, all the molasses have been paid for and were deposited at the buyer's risk in the tank from where they were withdrawn. (Or. Record, 12-13.)

The Government contention brings out the reasons for the enactment of Section 205(d). It was the intention of Congress that violations committed because of a subsequent amendment to the regulation under which the defendant acted could not be reached by an action for damages or penalities. An exception in a statute is similar to a proviso (Black on Interpretation of Laws, Second Ed. 427 et seq.). Only that an exception exempts absolutely from the operation of an enactment while the proviso defeats its operation conditionally. An exemption takes a case out of a statute which would otherwise be within the statute and is interpreted restrictively.

> "Office of proviso in statute is to except something from operative effect or to qualify or restrain generally a substantive enactment to which it is attached." *Andreas v. Clark,* (1934) 71 F. 2d. 908, Cert. denied, 55 C. St. 111, 293 U. S. 555, 79 L. Ed. 657.
>
> "Office of 'proviso' is usually to make exceptions from enacting clause, and make clear precedent matter,

but may be used to introduce new matter." *U. S. v. Mullendore,* 35 F. 2d 78.

"The particular intent expressed in a proviso or exception will restrain the general language of the enactment, and where a proviso is directly contrary to the purview of the statute, the proviso is good and not the purview, since the former gives expression to the later intention of the Legislature." *Rutgers, Chapter of Delta Upsilon Fraternity v. City of New Brunswick,* 32 A. 2d 364, 130 N. J. L. 216, affirming 28 A. 2d 759, 129 N. J. L. 238.

The dictum in *Foster v. Bowles,* 114 F. (2d) 870, 874 (Em. App. 1944), pretends to restrict section 205(d) to suits arising only because of a refusal to carry out an agreement entered into according regulations which are later amended and then the defendant refuses to carry out the agreement. But the language of Section 205(d) does not justify the limitation of its operations to that type of cases. It is plain from the context that the damages or penalties that no court can hold a person liable for under section 205(d) are the very same damages or penalties for which a person may be responsible under the Act. They are not necessarily the damages under the general theory of damages. The attempt in the dictum to limit the operation of the statute to actions suggested by the dictum is unjustified. For a better understanding of the dictum in the Foster case, we are copying the full paragraph in which the dictum appears.

"We are not called upon to decide whether complainant would be subject to punishment if under the present state of the regulations it completes its contract. This question will arise only in the event complainant completes its contracts and enforcement proceedings are brought in some court other than this. So far as the validity of the regulation reducing the maximum price is concerned, we think the indication of an intention not to permit damages or penalties by reason of a

party's compliance in good faith with the provisions of a regulation is no indication of an intention to require an existing regulation to remain unchanged. On the contrary by providing an immunity from damages or penalties for parties acting pursuant to regulations, Section 205(d) obviously assumes that contracts will not be carried out according to their terms. We have considered other arguments raised by complainant and find them to be without merit." *Foster v. Bowles*, 144 F. 2d 874.

Conclusion

Our case is an important one from the standpoint of the amount involved. The defendant is being charged with the payment of $42,501.36 damages and $21,250.68 penalties. The fears of what may happen if section 205(d) is interpreted as suggested by us, are by no means justified. The government is the one with power to enact regulations and amend them, and, if any body is in disadvantage, it is not the government but the public. In any way, Congress provided for a case as ours a specific provision protecting the seller and the facts of this case plainly show that they were those contemplated by Congress when enacting section 205(d) of the Statute.

WHEREFORE it is respectfully submitted that the petition for a writ of certiorari be granted.

BENJAMIN ORTIZ,
PEDRO M. PORRATA and
CHARLES CUPRILL,
Attorneys for Petitioner, Mario Mercado e Hijos,
By PEDRO M. PORRATA,
One of the Attorneys.
Box 1224-Ponce, Puerto Rico.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and regulation involved	2
Statement	5
Argument	8
Conclusion	12

CITATIONS

Cases:

Anderson v. *Mercado*, 163 F. 2d 303, certiorari denied, 332 U. S. 837	5, 6, 7
Bowles v. *Franceschini*, 145 F. 2d 510	9, 10
Bowles v. *Indianapolis Glove Company*, 150 F. 2d 597, certiorari denied, 326 U. S. 794	11
Bowles v. *Mannie and Company*, 155 F. 2d 129	11
Bowles v. *Rock*, 55 F. Supp. 865	10
Crary v. *Porter*, 157 F. 2d 410	9, 10
Foster & Company v. *Bowles*, 144 F. 2d 870	9
Porter v. *Bledsoe*, 159 F. 2d 495	9, 10
Porter v. *Mercado*, 67 F. Supp. 107	7
Schreffler v. *Bowles*, 153 F. 2d 1, certiorari denied, 328 U. S. 870	11

Statutes and Regulation:

Emergency Price Control Act of 1942 as amended, 56 Stat. 23; 58 Stat. 632; 59 Stat. 306; 60 Stat. 664; 50 U.S.C. App. 901 *et seq.*:	
Section 4(a) (50 U. S. C. App. 904(a))	3, 8, 9, 10
Section 205(d) (50 U. S. C. App. 925(d))	3, 8, 9, 10
Section 205(e) (50 U. S. C. App. 925(e))	3, 8, 9, 11
Price Control Extension Act of 1946, Sec. 12(b), 60 Stat. 676; 50 U. S. C. App. 925(e)(1)	4
Revised Maximum Price Regulation 183:	
Sec. 1 (8 F. R. 9532)	4, 10
Sec. 65 (9 F. R. 4820), Amendment 32, effective May 9, 1944	5, 6, 11
Amendment 45 (9 F. R. 9213), effective August 2, 1944	5, 6

Miscellaneous:

S. Rep. 931, 77th Cong., 2d Sess.	9

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 139

MARIO MERCADO E HIJOS, PETITIONER

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 85-89) is reported at 173 F. 2d 554. The findings of fact and conclusions of law of the District Court (R. 71-77) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 25, 1949 (R. 89). The petition for a writ of certiorari was filed June 23, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner contracted for the sale and delivery of molasses at a price determined in accordance with information received from a local OPA official who was not, however, a regional administrator or district director. The contract price was not in excess of the ceiling price in effect at the time of the contract. By amendment to Revised Maximum Price Regulation 183, the ceiling applicable to petitioner's sale and delivery of molasses was reduced to a price lower than the contract price. After the effective date of the new maximum price, petitioner made deliveries at the contract price, contrary to the statutory and regulatory prohibitions of deliveries at over ceiling prices. The questions presented are:

1. Whether Section 205(d) of the Emergency Price Control Act of 1942 gave petitioner immunity from liability for violation of the regulatory prohibition of deliveries at over ceiling prices by reason of the fact that the deliveries were made at a price which was valid when the contract was made.

2. Whether, under Section 205(e)(1) of the Act, petitioner's reliance, in determining its contract price, upon information furnished by the local OPA official, barred an action against it to recover damages for later making deliveries at a price in excess of the OPA ceiling established after the contract date.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1941, as amended, 56 Stat. 23; 58 Stat. 632; 59 Stat. 306; 60 Stat. 664; 50 U.S.C. App. 901 et seq., provided:

> Sec. 4(a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202(b) or section 205(f) or to offer, solicit, attempt, or agree to do any of the foregoing. [50 U.S.C. App. 904(a)].

> Sec. 205(d) No person shall be held liable for damages or penalties in any Federal, State, or Territorial court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Office of Price Administration and Civilian Supply, notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or

determined to be invalid. In any suit or action wherein a party relies for ground of relief or defense upon this Act or any regulation, order, price schedule, requirement, or agreement thereunder, the court having jurisdiction of such suit or action shall certify such fact to the Administrator. The Administrator may intervene in any such suit or action. [50 U.S.C. App. 925(d)].

Sec. 205(e) * * * The Administrator may not institute any action under this subsection on behalf of the United States, or, if such action has been instituted, the Administrator shall withdraw the same—

(1) if the violation arose because the person selling the commodity acted upon and in accordance with the written advice and instructions of the Administrator or any regional administrator or district director of the Office of Price Administration; * * * [50 U.S.C. App. 925(e)].[1]

Section 1 of Revised Maximum Price Regulation 183 (8 F.R. 9532) provided:

Regardless of any contract, agreement, lease, or other obligation or of any price regulation or order heretofore issued by the Office of Price Administration, no person to whom this regulation is applicable shall sell or deliver and no person in the course of trade or business shall buy or receive in the Territory of Puerto Rico any of the commodities set forth

[1] This provision was added by Section 12(b) of the Price Control Extension Act of 1946, 60 Stat. 676.

> in this regulation at a price higher than the maximum prices specified herein; and no person shall offer, solicit or attempt to do any of the foregoing.

Amendment 32 (9 F.R. 4820), effective May 9, 1944, added Section 65 to RMPR 183, which provided in relevant part as follows:

> (b) On or after May 9, 1944, the maximum price for molasses shall be 13.6¢ per gallon delivered at the mill.

Amendment 45 (9 F.R. 9213), effective August 2, 1944, insofar as here relevant, added to the above quoted language of Amendment 32 the phrase, "or at the mill tank."

STATEMENT

Since this case is here for the second time,[2] and since most of the earlier issues have been finally resolved, only a brief summary of the facts relevant to the present issues is deemed necessary.

Petitioner, a refiner of sugar and producer of molasses, entered into a contract on March 3, 1944, for the sale of most of its 1943-1944 season's production of molasses to a single purchaser. The contract price was 17¢ per gallon. Under the contract, title to the molasses passed to the buyer as soon as it was produced and the molasses was to be stored at the buyer's risk in petitioner's tank and withdrawn by the buyer at a later date. Before enter-

---

[2] See No. 422, October Term, 1947, certiorari denied, 332 U.S. 837.

ing into the contract, petitioner inquired of the local OPA office as to its ceiling price. It was informed in writing on February 29, 1944, by F. A. Besosa, an employee in the local OPA Food and Beverage Section, that the then current ceiling price was the highest price charged by the seller during the base period April 10 to May 10, 1942 (R. 48). Under the General Maximum Price Regulation which was applicable to molasses at the time, this advice was correct and the contract price of 17¢ per gallon was valid since it did not exceed petitioner's base period price. However, by Amendment 32 to Revised Maximum Price Regulation 183, effective May 9, 1944, the Price Administrator removed molasses from the coverage of the General Maximum Price Regulation and established a new (dollar and cents) ceiling price of 13.6¢ per gallon[3] for that commodity under RMPR 183. (See the Court of Appeals' opinion on the earlier appeal, 163 F. 2d 303, 305-306). Petitioner learned of this amendment on its effective date from a newspaper report but made no inquiry of OPA concerning it (R. 42-44). All withdrawals of molasses by the buyer from petitioner's tank were made thereafter from September 12, 1944, to December 7, 1944 (163 F. 2d at 306).

At the first trial the District Court held that, as to the bulk of the molasses, which was placed in

[3] Amendment 45, effective August 2, 1944, was merely a clarifying amendment which preceded petitioner's deliveries and which, in view of the present issues, has no significance here.

petitioner's tank prior to the effective date of Amendment 32, the sale and delivery had been consummated before the maximum price was lowered, and there was, therefore, no violation in the sale and delivery at the contract price of 17¢ per gallon. As to the balance, the overcharge was 3.4¢ per gallon and judgment was entered in favor of the Government for single damages so found, the court having determined that the violations were not intentional. *Porter* v. *Mercado,* 67 F. Supp. 107.

The Government and petitioner both appealed. The Court of Appeals reversed (*Anderson* v. *Mercado,* 163 F. 2d 303), holding that all the molasses had been delivered after the effective date of Amendment 32 at an over-ceiling price, in violation of RMPR 183. The cause was remanded for the re-assessment of damages equal to the total overcharges plus such further sum, within the statutory limits, as the District Court might deem proper if, upon further consideration, it should find that the violations had been wilful or the result of failure to take practicable precautions. The Court of Appeals considered and rejected the arguments urged here by petitioner. *Anderson* v. *Mercado, supra,* at 310. Certiorari was denied. 332 U. S. 837.

On remand, the District Court found that petitioner had failed to take practicable precautions to avoid the overcharge (R. 77) and judgment was entered in favor of the Government for an amount equal to one and one-half times the total overcharges (R. 78).

Petitioner again appealed, reiterating, *inter alia*, its earlier contentions, which the Court of Appeals again rejected (R. 85-89).

ARGUMENT

Petitioner's contentions, based upon the provisions of subsections 205(d) and 205(e) of the Emergency Price Control Act, were twice rejected by the Court of Appeals. This Court has already denied a petition for a writ of certiorari grounded, *inter alia*, upon the same contentions. The instant petition presents nothing warranting further review.

1. Petitioner's major argument is that Section 205(d) of the Act barred liability on account of sales made pursuant to a valid agreement under the provisions of the Act and that petitioner's deliveries, even though at a price higher than the then effective ceiling price, were made in fulfilment of a contract valid when entered into, thus meeting the conditions and entitling it to the protection of that section. This amounts to an assertion that the Administrator was powerless to make a lower maximum price effective against sellers who had foreseen such contingency and contracted for future deliveries at the price prevailing at the date of the contract. Such a construction of Section 205(d) would have brought that subsection into conflict with Section 4(a) of the Act which made it unlawful, regardless of contract, to sell *or deliver* in vio-

lation of the Administrator's regulations.[4] No Congressional intent to achieve such inconsistency is anywhere evident. Furthermore, petitioner's construction would permit a violator to gain an advantage from Section 205(d), a result which the legislative history of that section indicates the Congress did not intend to bring about. See Rep. 931, 77th Cong., 2d Sess.; *Bowles* v. *Franceschini,* 145 F. 2d 510 (C.A. 1); *Foster & Company* v. *Bowles,* 144 F. 2d 870 (E.C.A.). The clear purpose of Section 205(d), manifested by its grant of immunity of unqualified scope,[5] was to protect against suit for breach of contract a party whose performance of the contract was made illegal by OPA

---

[4] Petitioner has misread *Porter* v. *Bledsoe,* 159 F. 2d 495 (C.A. 4), and *Crary* v. *Porter,* 157 F. 2d 410 (C.A. 8), as authorities for the proposition that an agreement entered into after the issuance of a controlling regulation came within Section 205(d), while one entered into prior to the issuance of a regulation did not (Pet. 15-17). These cases made no such distinction. They clearly held that Section 205(d) protected things done in conformity with the Act but gave no immunity for violations thereof. Moreover, the attempted distinction of contracts made under a regulation from those entered into in advance of a regulation is negated by the all inclusive language of Section 4(a) of the Act: "regardless of any contract, * * * heretofore or hereafter entered into * * *."

[5] Compare this with the limited grant of subsection 205(e). The relevant provisions of both subsections were:

"205(d)—No person shall be held liable for damages or penalties in any Federal, State, or Territorial court, on any grounds for or in respect of anything done or omitted to be done * * *."

"205(e)—* * * The Administrator may not institute any action under this subsection on behalf of the United States, or, if such action has been instituted, the Administrator shall withdraw the same * * *."

regulation. *Bowles* v. *Rock*, 55 F. Supp. 865, 868 (D. Neb.). Were petitioner's view sound there would have been no need for this safeguard nor, significantly, for the scope of the immunity granted, since the contract would have prevailed over the regulation.

Moreover, we think the Court of Appeals correctly pointed out that the phrase, "agreement thereunder," used in Section 205(d) referred not to private contracts but to pricing agreements with industry groups under Section 5 of the Act. But even if we assume that the section did refer to private agreements, we submit that a contract providing for future delivery at the contract price, even though that price might exceed the OPA ceiling at the delivery date, far from constituting an agreement "under" the provisions of the Act, was violative both of the Act and the regulation. Section 4(a) of the Act and Section 1 of RMPR 183 prohibited deliveries at over-ceiling prices. An agreement to exceed the maximum price at the delivery date was illegal notwithstanding the validity of the contract price at the contract date. The protection of Section 205(d) obviously was not afforded to things done and agreements made in violation of the Act and regulation. *Porter* v. *Bledsoe, Crary* v. *Porter, Bowles* v. *Franceschini, supra.*

2. As a subsidiary argument which petitioner claims is offered to give color to the one discussed above (Pet. 19), and whose relevance is therefore

not clear, petitioner urges that its reliance upon the written advice of the OPA employee, Besosa, was sufficient to bring it within the protection of Section 205(e) of the Act (Pet. 19-22). Petitioner recognizes that Besosa was not one of the officials specified in that section (Pet. 20-21) but seems to argue an equitable estoppel against the Government for holding him out as a person from whom advice could be obtained. The fact is, of course, that this provision of Section 205(e) was added to the Act by the Stabilization Extension Act of 1946, long after Besosa's advice was given. The retroactive effect of this provision was to protect those who had relied upon the advice of the specified OPA officials. Wholly apart from the fact that in these circumstances the claimed estoppel is an obvious non sequitur, reliance upon advice from persons other than those designated for the furnishing of official interpretations creates no estoppel against the Government. *Bowles* v. *Mannie and Company,* 155 F. 2d 129 (C.A. 7); *Schreffler* v. *Bowles,* 153 F. 2d 1 (C.A. 10), certiorari denied, 328 U. S. 870; *Bowles* v. *Indianapolis Glove Company,* 150 F. 2d 597 (C.A. 7), certiorari denied, 326 U. S. 794.

In any event, Besosa's advice was requested and given concerning the then effective OPA maximum price. The advice given was correct and the contract price was valid when agreed upon. Thereafter the maximum price was lowered by Amendment 32 to RMPR 183 which affected future sales and deliveries. As to the new price, petitioner

neither asked for nor received advice from OPA. Thus, the essence of petitioner's argument is that the furnishing by OPA of information as to a current price disabled it from changing that price at any time in the future. This, we submit, is patently erroneous.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.
ROBERT S. ERDAHL,
JOHN R. BENNEY,
ISRAEL CONVISSER,
Attorneys.

AUGUST 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 848987 49

FILE COPY

FILED
NOV 4 1949
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 139

MARIO MERCADO E HIJOS,
Petitioner,

vs.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE,
Respondent

PETITION FOR RECONSIDERATION OF ORDER DENYING WRIT OF CERTIORARI

BENJAMIN ORTIZ,
CHARLES DUPREE, and
PEDRO M. PORRATA,
Counsel for Petitioner,
P. O. Box 1224, Ponce, P. R.

INDEX

Page

Index of Subject Matter

Preliminary Statement 1

Nature of the Case Petitioner Is Asking This Court to Review: That of a seller who kept records of all business transactions; who consulted the O.P.A. before entering into the sale agreement, subject of this suit; and who sold the molasses involved in the deal at the ceiling price established by the Revised Maximum Price Regulation No. 183 prevailing at the time of the sales. This is not a "black market" case 2

First Subsequent Amendment. The first subsequent amendment to the Regulation under which Petitioner made the perfectly legal and valid sale, covers only molasses *delivered at the mill* and did not cover molasses delivered *at the mill tank* 3

Second Subsequent Amendment. The second subsequent amendment to the regulation under which Petitioner made the perfectly legal and valid sale, which amendment covers molasses *delivered at the mill* tank, was not notified to the public, and became effective August 2, 1944, after all the molasses comprised in the deal were delivered to the buyer and had been placed at the buyer's control; the purchase price had been already paid and the molasses insured at buyer's risk and expense and for the benefit of the buyer 4

Investigation and Contract Readjustment Provision. As soon as the O.P.A. enacted the amendment No. 45 of August 2, 1944 to the R.M.P.R. No. 183 under which the Petitioner made the contract, which amendment established the 13.6¢ per gallon ceiling applicable to molasses delivered *at the mill tank*, an O.P.A. investigator was sent to the Peti-

Page

tioner's place of business. The investi[illegible]tor offerred to come back in case there was any violation, but failed to do so, in spite of the fact that the sale contract of March 3, 1944 provided for readjustment by O.P.A. officials if contrary to maximum price regulations 6

Sec. 205(d) of the Emergency Price Control Act (50 U.S.C.A. 405) does not allow the Government to collect damages and penalties from Petitioner on the basis of a subsequent amendment to the regulation under which Petitioner acted in good faith and pursuant thereto 8

Sec. 205(d) (50 U.S.C.A. 405) applies to a suit by the Government, as well as to a suit by an individual, provided the seller acted in good faith and pursuant to regulation, in which case a subsequent amendment is of no avail for the purposes of a suit 9

Subsequent Amendments of No Avail Against Seller Who Acted in Good Faith. The Administrator is not powerless to amend a regulation, but is powerless to avail itself of the subsequent amendment in an action for damages or penalties against the seller who acted in good faith and pursuant to the regulation as it stood before the amendment 10

Sec. 205(d) of the Emergency Price Control Act Should Prevail. In a conflict between Sec. 205(d) of the E.P.C.A. (50 U.S.C.A. 405), providing for the protection of all sellers acting in good faith pursuant to regulation, and section 4(a) (50 U.S.C.A. 904 (a)), Sec. 205(d) represents an exception or proviso within the statute and should prevail 11

Conclusion 12

Prayer 12

Index of Cases

Page

Fleming v. *Ashbough*, 158 F. (2d) 826 (C.C.A. 9th, (1947) (Delivery at the mill is not the same as delivery at a distribution point or at any other place different from the mill) 3

Index of Statutes

Sec. 205(d) of the Emergency Price Control Act (50 U.S.C.A. 405) 8

Sec. 4(a) of the Emergency Price Control Act (50 U.S.C.A. 904(a)) 11

Index of Regulations

Amendment No. 32 of May 9, 1944, to the Revised Maximum Price Regulation No. 183, providing for a ceiling price of 13.6¢ per gallon for blackstrap molasses *delivered at the mill* 3

Amendment No. 45 of August 2, 1944, to the Revised Maximum Price Regulation No. 183, providing for a ceiling price of 13.6¢ per gallon for blackstrap molasses *delivered at the mill tank* 5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 139

MARIO MERCADO E HIJOS,
Petitioner,

vs.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE,
Respondent

PETITION FOR RECONSIDERATION OF ORDER DENYING WRIT OF CERTIORARI

To the Hon. Chief Justice and Associate Justices of the Supreme Court of the United States:

Preliminary Statement

The Petition for Certiorari was filed on June 24, 1944. The Government brief in opposition, was filed on August —, 1949. Petitioner promptly replied. On October 10, 1949, Certiorari was denied. We are moving now for a reconsideration of the denial.

Our Petition for the Writ, raises two main questions of law. The first one, relative to the power of the District Court to grant damages or penalties under Sec. 205(d) of the Emergency Price Control Act, 50 U. S. C. A. 405, is sup-

ported on seven grounds, all of them enumerated in the Petition (Pet.-index). The second one, relates to the Chandler defense and the exercise of discretion in the lower court.

The "Statement of Matter Involved," "Questions Presented" and "Reasons for Granting the Writ," appear from pages 1 to 8 of the Petition. In support of this petition for reconsideration, Petitioner now adds the following arguments:

I

It should have some significance in this case that Petitioner carries records of each and every business transaction and that this case was tried on the basis of Petitioner's records. The openness of a transaction points to its honesty.

The sale of the molasses was made by Petitioner on March 3, 1944 at 17¢ a gallon. It also appears from the record that Petitioner, before entering into the sale contract, consulted the O. P. A. "in connection with the ceiling price for sales of molasses" (Or. R. 25-6). The O. P. A. advised "the present ceiling price is the highest price charged during the base period" (Or. R. 26-6).

Under the instruction and advice from the O. P. A., Petitioner then sold its molasses at the ceiling price authorized by the Revised Maximum Price Regulation No. 183 (Pet. P. 4, quotation from the opinion of the U. S. C. A., top).

This is not, therefore, a black market case. It is that of a seller who acted under advice from the very source of the law it was supposed to obey. After obtaining the advice, the seller sold pursuant to and in conformity with the prevailing regulation (the R. M. P. R.), but because of the subsequent amendments to the regulation under which the sale was made, the seller is confronted with an action not

only for the alleged overcharge, but also for additional penalties.

II

Let us examine now subsequent amendments 32 and 45 to the R. M. P. R. No. 183, under which the Government is prosecuting this action.

The first subsequent amendment of May 9, 1944, provided for 13.6¢ per gallon of molasses, *delivered at the mill. Sales for delivery at the mill are very economical as they do not require warehousing, handling and transportation facilities.* Amendment 32 reads as follows (8 F. R. 4820):

> "Maximum price for cane blackstrap molasses sold or delivered in the Territory of Puerto Rico (b) *On or after May 9, 1944,* the maximum price for molasses shall be 13.6¢ per gallon *delivered at the mill.*" (Emphasis supplied.)

Delivery at the mill, we must emphasize, is not the same as delivery *at the mill tank.* This distinction is already settled by the cases. *Fleming* v. *Ashbough,* 158 F. (2d) 826 (C. C. A. 9th 1947). The facts and law of the *Fleming* case are as follows:

The Government sought damages from a buyer for an alleged violation of Section 1381 of the Maximum Price Regulation No. 164, which provided:

> "1381.1. Maximum prices for red cedar shingles. On and after June 29, 1942, regardless of any contract, agreement, or other obligation (a) Where the shipment originates *at the mill* rather than at a distribution yard, no person shall sell or deliver red cedar shingles, and no person shall buy or receive red cedar shingles in the course of trade or business, at prices higher than the maximum prices set forth in Appendix A, incorporated herein as 1381.1". (Emphasis supplied.)

Affirming judgment for defendant, the court stated (P. 828):

> "It is obvious from the reading of paragraph 1381.1 that the burden of proof upon the Price Administrator is to show that each of the shipments in question '*originates at the mill rather than at a distribution yard.*' This regulation fixes no maximum price *when the shipment is not from a mill, even though not from a distribution yard.*" (Emphasis supplied.)

With respect to the Administrator's contention that defendant had taken possession of the shingles on the railway cars in California, the court said (P. 828):

> "Assuming appellant's contention that these places may be deemed the shipments' origins, *shipments from railway cars are not shipments from a mill and regulation 1381.1 does not create a maximum price for the shingles.*" (E. S.)

Similarly, in the instant case, delivery at the storage tank *situated in the Guayanilla Bay, two miles away from the mill,* was not delivery *at the mill.* Amendment 32 of May 9, 1944, providing for 13.6¢ per gallon *delivered at the mill, cannot, therefore, be considered as applicable*

In anyway, by the time this first amendment to the regulation, under which defendant made the sale agreement, became effective, 887,985 gallons of the 1,250,000 involved in the deal, had been delivered by depositing them in the tank located at the Guayanilla Bay, *to be used (the tank) by the buyer as a part of the contract consideration, provided, however, that removal therefrom should be made by the purchaser before December 15, 1944* (Or. R. 12-14).

III

Let us see about the second amendment. This was amendment 45, effective on August 2, 1944. The difference between the second and the first amendment, is very sig-

nificant. The second amendment provided the 13.6¢ per gallon ceiling price, *not only for molasses delivered at the mill, but also for molasses delivered at the mill tank.* It reads as follows (9 F. R. 9248):

> "(b) The maximum price for cane blackstrap molasses shall be 13.6¢ per gallon delivered at the mill or *at the mill tank.* This is a gross price to which may be added *no additional charges for warehousing, handling, transportation from mill to mill tank,* or between mills of the same company, or for any other service or incidents of sale except that a purchaser from a mill may on resale add the actual transportation charges incurred by him in transporting the molasses *from the mill* or *mill tank* to the point at which the buyer receives delivery."

This second amendment was not notified to the public, not even by radio. (R) And it seems that it was conceived with a view to the contract of sale made by Petitioner after consultation and advise of the O. P. A. However, by the time of this second amendment, all the molasses had been delivered, paid for and were under the control of the buyer. The facts in relation to this delivery and payment are not an open question now, it having been admitted as proved (Or. R. 12-13). The stipulation by the parties covering this and other points was as follows:

> "That due to the fact that the purchaser did not have sufficient storage facilities in which to keep the subject molasses as soon as manufactured by defendant the latter agreed as part of the contract's consideration to grant the purchaser the right to keep at the latter's risk said molasses in a storage tank located at Guayanilla Bay, property of defendant to be used by Destileria Serrales, Inc., *provided, however, that removal therefrom should be made by the purchaser before December 15, 1944*" (R. 12). (Emphasis supplied.)

"That defendant pursuant to said agreement placed in a tank owned by it and situated at Peñoncillo, Guayanilla Bay, about 2 miles away from the sugar mill, the following quantities of molasses for the purchaser on the following dates:

472,438	gallons	From March 4 to March 31, 1944
321,855	"	From April 1 to April 30, 1944
93,692	"	From May 1 to May 8, 1944
177,978	"	From May 9 to May 31, 1944
184,077	"	From June 1 to June 24, 1944."

"That pursuant to the provisions of said contract defendant billed, and received payment from Destileria Serrallés, Inc., for the subject molasses, the following amounts on the following dates:

Date of Bill:	Date of Payment:	Gallons:	Amount:
March 31, 1944	April 17, 1944	472,438	$80,314.46
April 30, 1944	May 9, 1944	321,855	54,715.35
May 31, 1944	June 20, 1944	271,670	46,183.90
June 24, 1944	July 18, 1944	184,037	31,286.29
	Total	1,250,000	$212,500.00"

It is plain, therefore, that by the time of the second amendment, all the molasses had been delivered and the contract was entirely consummated, that is to say, *became a thing of the past*. The stipulation reveals that the molasses were under the custody of the buyer, insured by the buyer for his own benefit and that the seller had nothing to do any more with them. The seller facilitating of the tank to the buyer was a part of the contract consideration and because the buyer was lacking in storage facilities (Or. R. 12-13).

IV

As shown heretofore, the amendment 45 making 13.6¢ a gallon ceiling for molasses *delivered at the mill Tank*, became effective on August 2, 1944 (9 F. R. 9248). What did the O. P. A. do after putting into effect this second amend-

ment? It sent an investigator to Petitioner's business. The investigator, Mr. Vergne, contacted Mr. Mandry. He told Mr. Mandry that he thought that the contract violated the regulations of the O. P. A., but that it was the practice of the O. P. A. to get in touch with the people before filing suit. Mr. Mandry waited for the O. P. A. to come to him, *but nobody ever did.* Instead, by December 20, 1944, the Government filed suit. Mr. Mandry's testimony is as follows (R. 56):

> "X Q. Did he tell you anything about whether that contract violated any regulation of the O. P. A.?
>
> A. Well, he told me that he had seen the contract and that he thought that it violated the regulation of the O. P. A., but he said that it was the practice of the O. P. A. to get in touch with the people before filing suit.
>
> X Q. With what people?
>
> A. Well, when they found any irregularity, they would go to them and say, this has been found here, and such a thing has been done. We feel that there is something wrong here, and they give a chance to fix things up, if anything was to be done.
>
> X Q. Did the O. P. A. ever, before the complaint was filed, come to you to fix or arrange or settle that matter? ?
>
> A. *No, they never did. They filed suit.*" (Emphasis supplied.)

In connection with the failure of the O. P. A. to treat Petitioner as it treated other people, it should be remembered that the contract of March 3, 1944, after setting the 17¢ price, provided that such price (Or. R. 103):

> "*will be subject to readjustment if it shall be so determined after this date by the Defense Supply Corporation, the Office of Price Administration, or any other Government Agency, Insular or Federal, having jurisdiction over the molasses.*" (Emphasis supplied.)

It should be plain, therefore, that, if there was a possible violation, no case is better fitted for the practice of giving an opportunity to the seller to readjust than the present one. But the O. P. A. apparently was not interested in the readjustment: it was interested in suing, and in going against Petitioner *for damages and penalties.*

V

In our Petition, we deal quite thoroughly with Sec. 205(d) (50 U. S. C. A. 405). In this motion for reconsideration of the denial of the writ, we must come back to Sec. 205(d).

There is a tendency in our courts to limit the rights of individuals as against the Government in the interpretation of congressional legislation. That tendency should be reversed or modified, and this case offers a great opportunity for so doing.

Section 205(d) begins with an emphatic "no" protecting every person, subjected to our laws, from liability for damages or penalties "*on any grounds or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement or agreement thereunder,* etc." The language used in Sec. 205(d) is, therefore, wide enough to make it impossible for any court to say that actions by United States are not covered by its provisions. The *damages and penalties* to which Sec. 205(d) refers are, undoubtedly, those authorized by the Emergency Price Control Act against violators.

But Sec. 205(d) goes further: It provides that the lack of power of any court to grant damages or penalties *when the seller acts in good faith and pursuant to regulation, holds* "*notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may*

be modified, rescinded, or determined to be invalid" (50 U. S. C. A. 405).

This provision that a subsequent amendment of a regulation can be of no avail in action for damages or penalties against a seller acting in good faith and pursuant to regulation, is applicable to the Government more than to any other suitor. Why? Simply because the Government is the only one with power to amend a regulation.

VI

The Government argues that our construction would permit a violator to gain advantage from Sec. 205(d), a result—the Government continues saying—which the legislative history of that Section indicates Congress did not intend to bring about. In support of this argument, it cites Rep. 931, 77th Cong., 2d Sess.; *Bowles* v. *Franceschini*, 145 F. 2d 510 (C. A. 1); *Foster & Company* v. *Bowles*, 144 F. 2d 870 (E. C. A.). And the Government further argues that the purposes of Sec. 205(d) was to protect, against suits for breach of contract, a party whose performance was made illegal by O. P. A. regulation. But all these arguments bear no fundamental value against our contention.

In the first place, Petitioner is not arguing that Sec. 205(d) protects a violator. We are arguing that Sec. 205(d) protects a person who acts in good faith, as Petitioner did, pursuant and in conformity with regulation, as Petitioner also did. The sale of March 3, 1944 was made after consultation with the O. P. A. and in conformity with the Revised Maximum Price Regulation then prevailing. After Petitioner complied with the regulation, incurred in liabilities and acquired rights, delivered the molasses under the contract, and received payment for the molasses delivered, *then (August 2, 1944) the Government amended the regulation setting a ceiling of 13.5¢ per gallon delivered at*

the mill tank. It is because of this subsequent amendment, that Petitioner is being sued. However, the Government is not entitled to damages and penalties. Why? Because the prohibition against a territorial court holding a person liable for damages or penalties for anything done in good faith pursuant to a regulation or agreement thereunder, makes it clear that this exemption from liability holds "*notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid,*" *(supra),* and amendment 45 to the regulation under which Petitioner sold and delivered the molasses, represents the modification contemplated by Sec. 205(d) of the Act.

VII

Furthermore, why should a person who acts according to regulation be protected against a suit by another person and yet be liable in a suit from the Government? Is it that we are taking for granted that "the King can do no wrong." And, why talk against possible advantages in favor of a seller who consults the O. P. A. before making the sale, sells pursuant and in conformity with regulation and at the ceiling price then prevailing, when it is clear that a person acting with all these precautions should not be the subject of prejudice but the subject of praise?

The Government further argues that our argument amounts to an assertion that the Administrator was powerless to make a lower maximum price against sellers who had foreseen such contingency and contracted for future deliveries at the price prevailing at the date of the contract. But this is merely saying that a statute should read different from what it reads because something may happen if it reads as it does. However, the Government argument forgets that the statute protects only compliance in good faith

and that there is nothing in the record to prove that the contract of March 3, 1944 was made in bad faith. On the contrary, the fact of consultation with the O. P. A. and the fact that the subsequent amendment did not come but months later, after all the molasses had been delivered and paid for under the terms of the contract, points to the presence of good faith in making the contract of March 3, 1944, and, therefore, to the application of Sec. 205(d). *The cornerstone for the application of Sec. 205(d) is compliance in good faith with the prevailing regulation, and then, a subsequent amendment is not available in any court of the United States for the purposes of an action for damages or penalties.*

VIII

Another Government argument against the application of Sec. 205(d) is that Petitioner's interpretation brings Sec. 205(d) (50 U. S. C. A. 405) into conflict with Sec. 4(a), (50 U. S. C. A. 904(a)), which makes it unlawful, regardless of contract, to sell or deliver in violation of regulation. These—in our judgment—are complaints to be taken to legislators and not to courts.

However, if there is any conflict, Sec. 205(d), representing an exception or a proviso within the statute, should prevail (Pet. Reply Brief, p. 5-8). But who sold or delivered in violation of any regulation? Petitioner sold pursuant to regulation (R. M. P. R.) and in compliance thereto in good faith. When amendment 45 of August 2, 1944, became effective, all the molasses had been delivered under the contract and paid for by the buyer, and, besides, were under the buyer's control, insured to his benefit, etc. (Stipulation, Or. R. 12-13).

It was the O. P. A. subsequent amendment, that produced the troubles for the seller; but a subsequent amendment to a regulation pursuant to which a person acts or omits

to act in good faith, cannot be used by the Government itself (author of the amendment) in an action for damages or penalties. So is the clear and patent language of Sec. 205(d).

Conclusion

The reasons for reconsidering the denial and for granting the writ, are everywhere in the facts and nature of this case an appeal to the sense of fairness, typical of our system of justice. It is true that only a small Puerto Rican firm is involved directly in the erroneous decision, but the principles applied by the lower courts affect or concern everybody under our laws. We all know that our Congress was not altogether satisfied with the practical interpretation of the E. P. C. A. by the O. P. A. in certain cases. This is one of those cases in which an impossibility is being required of Petitioner and our only recourse now is the intervention of this Supreme Court to examine this case and determine whether Petitioner is right and whether error was committed by the courts below.

Prayer

In view of the foregoing, Petitioner respectfully prays a reconsideration of the order denying the writ of Certiorari.

San Juan, Puerto Rico, November 2, 1949.

Respectfully submitted,

BENJAMÍN ORTIZ,
CHARLES CUPRILL, and
PEDRO M. PORRATA,
Counsel for Petitioner,
P. O. Box 1224, Ponce, P. R.,
By PEDRO M. PORRATA.

CERTIFICATE OF SERVICE

Counsel certifies that on this date a copy of this petition for reconsideration was placed in the Post Office of San Juan, Puerto Rico, addressed to the U. S. Department of Justice, Office of the Solicitor General, Washington, D. C.

San Juan, Puerto Rico, November 2, 1949.

PEDRO M. PORRATA.

Certificate of Counsel

Counsel does hereby certify:

That the accompanied petiiton for reconsideration is filed in good faith, because petitioner honestly believes, and so does his counsel, that there are good legal grounds for same, and counsel does also certify that this petition is not filed for the purposes of delay.

San Juan, Puerto Rico, November 2, 1949.

BENJAMIN ORTIZ,
CHARLES CUPRILL, and
PEDRO M. PORRATA,
Counsel for Petitioner,
By PEDRO M. PORRATA.

(5060)